BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	
FOUNDATION FOR THE RETARDED OF THE DESERT,	)	
	)	
Appellant,	)	FILE AHB-WCA-03-70
	)	
From the Decision of	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Respondent.	)	
	)	

ORDER ADOPTING PROPOSED DECISION

The attached proposed decision of Administrative Law Judge David R. Harrison is adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective ____May 12, 2005_____. Judicial review of the Insurance Commissioner's decision may be had pursuant to California Code of Regulations, title 10, section 2509.76. The person authorized to accept service on behalf of the Insurance Commissioner is:

Staff Counsel Darrel Woo
300 Capital Mall 17th Floor
Sacramento CA 95814

Any party seeking judicial review of the Insurance Commissioner's decision shall file the original petition for a writ of administrative mandamus with the court and also shall mail copies of the petition and the final Notice of Entry of Judgment and any writ of administrative mandamus to the Administrative Hearing Bureau of the California Department of Insurance.

DATED: ___April 12, 2005_____ , 2005

John Garamendi
Insurance Commissioner

By:

_____/s/_____
ANDREA L. BIREN
Special Counsel to the Commissioner

DEPARTMENT OF INSURANCE
ADMINISTRATIVE HEARING BUREAU
45 Fremont Street, 22nd Floor
San Francisco, CA 94105
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PROPOSED DECISION

Introduction

Appellant, Foundation for the Retarded of the Desert ("Foundation"), appeals under Insurance Code section 11737(f)[1] from certain decisions of Respondent, State Compensation Insurance Fund (" State Fund" or "SCIF"), relating to workers' compensation insurance policies issued by State Fund to Appellant for policy years beginning July 1, 2001 (Policy #1615964), and July 1, 2002 (Policy #768 46-02).

The Foundation is a not-for-profit organization that provides a variety of services

[1] Section 11737(f) authorizes an appeal to the Insurance Commissioner where a person is aggrieved by the application of an insurer's rate filings, and a request for review of the action is rejected or otherwise unfavorably determined by the insurer.

to persons who are mentally retarded. One group of such persons consists of individuals who function at levels so significantly below a normal worker's capacity that they are not capable of vocational training.[2] The principal issue in this case is whether these individuals (hereinafter referred to as the "habilitation Clients" or "Clients") were "employees" of the Foundation who must be covered by workers' compensation insurance, or whether they were non-employee participants in Foundation programs, not requiring workers' compensation coverage.

Contentions of the Parties

The parties' contentions are as follows:

1. Status of Habilitation Clients.

State Fund contends that the habilitation Clients of Foundation during the policy years in question were "employees" of the Foundation for workers' compensation purposes, who must be covered by workers' compensation insurance, and premium must be paid for them by the Foundation. State Fund further contends that the Foundation is estopped from claiming that the Clients were not employees because, during the two policy years in issue, three different claims for benefits were received and paid by State Fund arising out of incidents involving three different Clients.

Foundation contends that the habilitations Clients were not "employees" and need not be covered by workers' compensation insurance. Foundation further contends that the three Client claims that reached State Fund were the result of inadvertence or error, that there was no intention to claim that the individuals involved were "employees" of Foundation, and that estoppel is therefore not applicable.

2. Classification of Directors and Instructors in Habilitation Programs.

State Fund determined that the five program directors and instructors who supervised and taught the habilitation Clients must, pursuant to the California Workers' Compensation

[2] One sufficient criterion for discontinuing vocational training, once begun, is that "There is clear and convincing evidence * * * that the individual cannot benefit from vocational rehabilitation services in terms of an employment outcome due to the severity of the individual's disability." (Cal. Code Regs., tit. 9, §7179.1, relating to vocational rehabilitation programs conducted under the auspices of the Department of Rehabilitation). Where, as with the Clients in the present case, the evidence is clear before the training begins that the individual cannot benefit from it, the individual is not eligible for the training.

Uniform Statistical Reporting Plan[3] ("USRP" or "Reporting Plan") be classified under Classification 8806 -"Sheltered Workshops or Work Activity Centers – all employees – including supervisors, educational instructors, counselors, production managers and vocational evaluators."[4]

Appellant contends that the programs conducted by these directors and instructors were not conducted under any "sheltered workshop" or other exemption certificate and that the proper classification for these directors/instructors is Classification 8868 - "Colleges or Schools – Private – not automobile schools – professors, teachers or professional employees."

3. Governing Classification for the Foundation.

The parties agreed that the "governing classification" for the Foundation would be determined by the classification that generated the most payroll.[5]

State Fund's determination that the habilitation Clients were "employees" of the Foundation, to be classified under Classification 8806 - "Sheltered Workshops, etc.," would have resulted in assignment of the largest portion of the Foundation's payroll to Classification 8806, which would then have been the governing classification.

Appellant contends that the habilitation Clients were not employees of the Foundation, and that, as a result, the classification that generated the most payroll was 8868 - "Colleges or Schools – Private, etc.," which would therefore be the governing classification.

4. Classification of Bus Drivers.

The parties agreed that the bus drivers who transported the Clients to and from the Foundation each day must be classified under the governing classification for the Foundation. Their disagreement is over the issue of what is the governing classification (see Contention 3, *supra*).

The parties were in agreement that if the governing classification is 8868, the proper classification for the bus drivers is Classification 9101 - "Colleges or Schools – Private –

[3] The Reporting Plan is approved by the Commissioner under a grant of legislative authority. (Ins. Code §11734(a); Cal. Code Regs. title 10, §2318.6.) The Reporting Plan itself acknowledges this and further provides that the "Plan contains the necessary rules…for the filing of policy documents and reporting of experience in connection therewith…." (Reporting Plan, Part 1, Section I, Rules 1 & 2, page 1.)

[4] Because this classification dispute arose under the Appellant's 2001 and 2002 policies with the State Compensation Insurance Fund (e.g., Ex. 17, at 17-1), the 2001-2002 editions of the Reporting Plan are used. The USRP descriptive paragraph under Classification 8806 stated: "This classification shall apply to each location of those sheltered workshops or rehabilitation facilities ***certified as exempt from the minimum wage law*** by the United States Department of Labor, Employment Standards Administration, Wage and Hour Division, and/or the California State Department of Industrial Relations, Division of Labor Standards Enforcement." (USRP, both years, page 96) (Emphasis added.)

[5] The USRP at Part 3 – Standard Classification System, Section II, 3 (c), defines "Governing Classification" as the classification to which the largest amount of payroll is assigned, excluding standard exceptions and miscellaneous employees. Standard exceptions in this case would include clerical and outside sales employees.

not automobile schools – all employees other than professors, teachers or professional employees – including cafeterias;" and if the governing classification is 8806, the bus drivers must be classified under 8806.

Positions Taken by the Workers' Compensation Insurance Rating Bureau

This appeal initially included appeals from decisions made by the Workers' Compensation Insurance Rating Bureau ("WCIRB" or "Bureau").[6] As the case progressed and the issues clarified, however, both parties acknowledged that the Bureau was correct in determining that the five directors and instructors (Contention 3, *supra*) should be classified under Classification 8868 - "Colleges or Schools – Private – not automobile schools – professors, teachers or professional employees," and not under 8806 – "Sheltered Workshops, etc." (WCIRB Pre-Hearing Brief dated September 28, 2004, 3/6-14).

The Foundation and State Fund so stipulated as to four of the directors/instructors at the beginning of the evidentiary hearing held on October 20, 2004, and as to the fifth and final one at the close of that evidentiary hearing. (Tr. 13/3-20; 172/2-13). The classification of the directors and instructors is, therefore, no longer an issue, and they are to be classified under Classification 8868.

The Bureau further determined that the bus drivers (Contention 4, *supra*) were employees whose classification would be based on the governing classification for the Foundation. The governing classification would be determined by the classification that had the greatest amount of payroll on the Foundation's books. (WCIRB Pre-Hearing Brief dated September 28, 2004, 3/17-18, 4/1-15).

[6] The Workers' Compensation Insurance Rating Bureau is a rating organization licensed by the Insurance Commissioner under California Insurance Code sections 11750 et seq. to assist the Commissioner in the development and administration of workers' compensation insurance classification and experience rating systems. It serves as the Commissioner's designated statistical agent for gathering and compiling experience data under California workers' compensation and employer liability policies. (Ins. Code §11751.5.)

Based on the financial data supplied by State Fund, the Bureau opined that 8806 would be the governing classification if the Clients were held to be employees. If the Clients were not employees, however, 8868 would be the governing classification for the Foundation (*Ibid*). The parties agreed with the Bureau's opinion. Thus, all remaining issues turn on the single issue of whether the Clients were "employees."

Issue Statement

During the policy years beginning July 1, 2001 and July 1, 2002, were the Foundation's habilitation Clients "employees" of the Foundation and therefore required to be covered by workers' compensation insurance?

Procedural History

On November 10, 2003, the Foundation filed an appeal from the 2001 policy year audit conducted by State Fund and from a classification decision issued by the WCIRB on October 13, 2003. On December 30, 2003, an Appeal Inception Notice was issued.

While the original appeal was pending, State Fund completed a premium audit for the 2002 policy year that presented substantially the same issues as the 2001 audit. The Foundation appealed, and the appeals for both years were consolidated on March 29, 2004.

The case was assigned for hearing and decision to Administrative Law Judge ("ALJ") David R. Harrison on August 23, 2004, and a live evidentiary hearing was held before him in Los Angeles on October 20, 2004.

At the hearing, Naran Reitman, Esq. appeared as counsel for the Foundation; and Betty R. Quarles, Esq. appeared as counsel for State Fund. John N. Frye, Esq. appeared by telephone

as counsel for the WCIRB during the telephonic testimony of Paul Brundage, a quality assurance director in the Bureau's Classification and Test Audit Division.[7]

The parties filed pre-hearing briefs, and documentary and testimonial evidence was presented at the hearing. Certain proposed joint exhibits had been objected to prior to the hearing, and those for which objections had been sustained[8] were not admitted. All other exhibits in the joint exhibit list were admitted. A later clarifying exhibit was submitted by Appellant (Exhibit 59 – Full Copy of Blanket Accident Policy issued by American National Life Insurance Company to the Foundation), and was admitted.

The parties filed post-hearing briefs. Following receipt of the post-hearing briefs, the ALJ issued an order for additional evidence and argument, which was received from both parties. Post-hearing exhibits were also proposed and submitted.

A further evidentiary hearing was held before the ALJ by telephone on February 17, 2005 at 10:00 a.m., at which the parties presented oral and (previously lodged) documentary evidence (Exhibits SC-1, SC-2; and F100 through F110).[9]

At the February 17, 2005 hearing, the parties were represented by the same counsel as at the earlier evidentiary hearing on October 20, 2004. All of the admitted exhibits and the testimony presented at the original and subsequent hearing comprise the evidentiary record in this case.[10] The record was closed by formal notice on March 16, 2005.

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[7] Tr. p.51

[8] Exhibits numbered 12, 16, 21, 42, 43, 44, 55, 56, and 57 were not admitted.

[9] The ALJ ordered that certain of these exhibits be redacted for privacy reasons, and this was done.

[10] The transcript of the October 20 hearing is referred to as "Tr.", and the transcript for the February 17 hearing as "Tr2." Page and line references are designated by page number/line numbers. Thus, page 13, lines 22-23 of the February 17 transcript would be "Tr2. 13/22-23." If only pages are referred to, the reference will be "Tr. p.___" or "Tr. pp.___" for multiple pages.

Findings of Fact

The Foundation's Operations

The Foundation is a public not-for-profit membership organization engaged in training retarded individuals in various programs, including social recreation, adult day care, independent living and supported living. The habilitation Clients are taught daily living skills, personal hygiene, and social skills in specifically designed habilitation programs. The habilitation programs do not operate under the Foundation's sheltered workshop certificate.

The Foundation also operates a sheltered workshop for teaching and training mentally retarded and physically handicapped young adults from 16 years of age and older with a view to their eventual placement in the work force. The Foundation's workshop is certificated by state and federal agencies to pay these clients less than the minimum wage. The workshop clients are also taught daily living skills, personal hygiene and social skills. In addition, capable clients are trained in various work activities such as bulk mailing, collating, screen printing, embroidery, food service training, janitorial and grounds care training, for which they are paid less than the minimum wage. Capable clients may also work at businesses in the surrounding area, where they are also permitted to be paid less than the minimum wage.

The non-workshop training programs and the workshop programs are physically separated, and employees do not interchange. The insured's premises consist of all of 3 single story buildings with a separated clerical office. (Ex.47-3)

Characterization and Activities of the Clients

The individuals whose status is at issue (the "Clients") are persons whose mental/physical capacity has been determined, after study and examination by staff and other professionals, to be such that they cannot be *vocationally* trained. (Tr. p.183.) They are daytime participants in

Foundation programs designed to meet their individual needs for instruction and training in daily living skills, personal hygiene, public behavior, appropriate dress and socialization.[11]

The Foundation programs for these Clients are not operated under state or federal sheltered workshop certificates (Ex 47-3), which are issued to license vocational training for handicapped individuals who may be able to join the work force upon completion of their training. The Clients are not eligible to participate in certificated sheltered workshop programs, because they lack the capacity for such vocational training. They have no prospects for ever entering the work force.[12]

The Clients can and do participate in "work activity" programs at the Foundation. (Tr. pp.182-183.) These programs are not, however, designed to train Clients for entry into the work force, and they are not recognized by the California Department of Rehabilitation as programs for which the Department will pay the costs of workers' compensation insurance to cover the participants. An express inquiry on this subject was made to the Department by the Foundation, and the Department expressly repudiated any responsibility. (Ex. 13.)

The Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code, Chapter 4.5, sections 4500 - 4865) is the statutory authority for the activities of the Foundation and authorizes the payments made to it by public agencies for the services it provides to the Clients. Pursuant to the Lanterman Act, each Client is evaluated at time of intake and progressively evaluated over a period of weeks to determine his/her capacities and to begin formulating an Individual Program Plan ("IPP"), which sets out the goals for training and experience of that individual within the Foundation's facilities and programs. The IPP is reviewed annually, and, where appropriate, changes are made. The IPP's for these Clients are

[11] Tr. pp. 28-30; 35; 41; 43-44; 130-131; 183-187.
[12] Tr. pp. 97-98; 183. See also footnote 2, *supra*.

devoid of vocational goals looking toward employment. (Tr. pp. 38-41; 127-128; 185-187.) Rather, the goals are for modifications that will effectively teach the Clients to engage in socially acceptable behavior. A primary method for accomplishing this is to set up simulated work environments, where rules for socially acceptable behavior can be taught in a relevant context. (Tr. pp. 130-134; 183-187.)

For many of the Clients, the Foundation serves as their "community," a place where they are known and welcomed daily, a haven of familiar comfort and a sense of belonging. (Tr. pp. 130-131; 143-144.) Some of the Clients have been coming to the Foundation for more than 20 years. (Tr. pp. 39; 183.) The Foundation serves as the place where they can practice basic social and living skills on a daily basis, and simulate the activities of normal persons. (Tr. pp. 130-131; 183-187).

Such "work" as the Clients do is in the nature of a "simulation," emulating what normal persons do, without, however, actually performing "productive labor." (Tr. pp. 130 –134; 183-187.) The Clients perform no "services" for which they are accountable to the Foundation. They are like students and wards for indefinite periods, except that nothing is expected of them, and they do not get "flunked," expelled or "fired" for nonperformance. (Tr. pp. 39-41; 187.) They can refuse to do anything while they are at the Foundation; they can take extended leaves of absence and return to the Foundation and its programs as they wish; these acts in no way foreclose them from participating or returning when they decide to do so. (Tr. pp. 39-41; 67-69.)

The clients are closely supervised in all phases of their activities, both personal and program-oriented, while present at the Foundation. (Tr. pp. 81-82; 143.) This is necessary for their personal safety as well as their training in social behaviors.

Client Stipends

The Clients are paid money by the Foundation. The amount of the stipend is specifically

calculated and included in each client's IPP, and comes out of the funding provided to the Foundation under the Lanterman Act. (Tr. pp.66-67; 74-77.)

The money a Client receives is based on an assessment of his/her productive capacity (not actual production), as compared to that of a non-handicapped person in performing simple tasks. The capacity determinations are based in large part on time studies. (Tr. pp. 74-77.) The Client is given various simple tasks to perform (e.g. laying out a tee-shirt flat on a surface, or folding a tee shirt in whole or in part), and is timed for completion. The same tasks are timed, as performed by several regular members of the staff at the Foundation. The time taken by the Client is compared to the average time taken by the staff members, and staff time is gauged at an appropriate wage rate. The stipend paid to the Client reflects the approximate proportion between the staff time and the Client's time. Thus, if staff personnel generally fold a tee shirt in a minute or less, and a Client (if able to perform the task at all) does so in an hour, the Client's stipend based on this test would be roughly 1/60th of the staff rate, the amount being further reduced to take into account fatigue factors for repetitive tasks. The actual stipend is based on time measurements in a variety of tasks. The stipend is paid bi-weekly on the 7th and 22nd of each month, "as if" it were a regular pay check. (Tr. p.100.)

The amounts of the stipend checks are based on the hourly rate established as a result of the initial assessment of productive capacity, and on the individual Client's attendance record during the stipend period. The check amounts are not based on any "work" the Client actually does, nor any hours he/she spends in work activity programs. The stipend is paid in full based on a six and a half hour day, even if the Client declines to participate in any of the day's activities. All the Client has to do is arrive on his/her scheduled bus and stay until the bus leaves at the end of the day --- six and a half hours later. The stipend serves primarily to familiarize the Client with the concept and handling of money, and encourages the Client's regular attendance.

The time study tests are conducted quarterly under applicable state and federal regulations, largely in order to keep the regulatory agencies current on changes that might justify moving a Client to a higher level, namely, rehabilitation or vocational training. (Tr. 74-77.) This upward movement "never" occurs at the disability levels of these Clients. (Tr. pp. 96-97; 183-188.)

The stipends are not in lieu of salaries that the Foundation might otherwise have to pay regular employees. The Clients do not perform tasks or services for which the Foundation would otherwise hire employees. (Tr 190/17-192/7.)

Such tasks as the Clients attempt are simulations of real employment. For example, the Foundation has contract projects for stuffing envelopes for an outside firm. The Clients are generally not able to fold the documents to be stuffed, nor are they capable of stuffing them after they are folded. They may be capable of making a single fold, or in some instances, just picking up a piece of paper and passing it to the next person to start a fold. (Ex.33, DVD). Without the Clients' participation, the same project would be accomplished in a fraction of the time and require a much smaller commitment of staff. (Tr. 118/4-16) The participation is not, in this sense, a "service" to the Foundation. Rather, it is a learning experience for the Client, much like a classroom project in a normal school setting.

Similarly, a "janitorial" program may entail picking up wastepaper baskets from some offices, which can become a play activity in which the Clients appear and re-appear at frequent intervals looking for a basket to collect. (Tr. pp.142, 148-149.) Where the janitorial program for these Clients includes housekeeping activities, the typical situation is where a Client may attempt to "clean" a bathroom, and, after the Client is done, the real cleanup, including cleaning up the results of the Client's cleaning, is done by paid staff personnel. (Tr. pp. 190-192.)

The "food service" program, at the Clients' level, may permit a Client to practice putting a pre-sliced piece of lunch meat or cheese on a piece of bread --- but the Clients are not permitted to handle food that is served to others, nor do they prepare the food they are served. (Tr. pp.117, 141, 191/16-27.) For this purpose, Foundation employs properly certificated and regularly paid staff. (Tr. p.141.)

"Silk screening" program activities for the Clients may consist only of learning to lay a piece of cloth flat on a surface where it can then be picked up for use. Guided by the hands of an instructor on their hands, Clients may experience the "feel" of running a smoothing board over a piece of material preparatory to printing. The Clients learn to distinguish colors in containers, but never handle the actual pigments, nor do they run machinery of any sort. (Tr. pp. 38, 145-146.)

All of the tasks described, as performed by the Clients, are in contrast to the tasks that might be performed by individuals with higher capacities in sheltered workshop or other rehabilitation programs. There, the purpose is training for possible employment, and the participation is at a significantly higher level in programs that may be similarly named --- e.g. the higher level janitorial program may entail useful cleanup; silk screening may involve more complex stages of the process, etc.(Tr. pp.97-98.) The work activity programs in which the Clients do engage, and the sheltered workshop programs for vocational training (in which the Clients lack the capacity to engage), are physically separated and personnel do not interchange.[13]

Hours of Attendance

The Clients' hours of attendance are those of school children, including their meal times and their morning and afternoon "breaks."(Tr. p. 115) They are transported on Foundation buses. If their bus is scheduled to arrive at 8:30 a.m., they are scheduled to leave at 3:00 p.m. If

[13] Ex. 47-3.

they arrive on the 7:30 a.m. bus, they leave at 2:00 p.m. (Tr. p. 65.) The hours are prescribed by the funding agencies, and the required attendance day is 6.5 hours in length, including breaks and meal times. (Tr. pp.64-65.) The arrival and departure times of these Clients are dictated by the 6.5-hour requirement of the Foundation's funding, and their transportation to and from the facility is carried out solely by the Foundation. They do not come or go by car or any other non-Foundation transportation. (Tr. pp. 65-66.) The funding mechanism for the Foundation resembles the method used to fund public schools, the amount received by the Foundation being dependent in large part on the daily attendance figures it achieves. (Tr. pp. 64-67.) For the Foundation, a "day of attendance" is the full 6.5 hours, as no payments are made for "partial" days. (Tr. pp.64-65.)

Injury Claims Received by State Fund

All the Clients were covered by SSI and Medi-Cal for medical care (Tr. pp.78-79; 160; 192-193). The Foundation also maintained student accident insurance policies to cover accidental injuries that might occur on its premises. (Ex. 59.) This insurance was not the equivalent of workers' compensation insurance under California law, but was a means of assuring that if an accident occurred, there would be coverage for immediate treatment if needed.[14] By their specific terms, the student accident policies did not cover claims covered by workers' compensation (Ex. 59.)

The Foundation records disclosed that during the two policy years in issue, seven claims of actual or potential injury to Clients arose. (TR2. 10/11-17; Ex.F101.)[15] Of these seven

[14] Tr. p. 160.

[15] In an abundance of caution, Foundation, pursuant to the ALJ's post-hearing redaction order, redacted the entire name of each individual claimant from the exhibits it had submitted at the February 17, 2005 hearing. Names were given in the testimony of witness Rhonda Levandowski at the February 17, 2005 hearing, with specific reference to the exhibits covering the claimants. The seven claimants were (Tr2. pp. 10-11): Maria M., Jodi D., Tony N., Javier M., Kelly B., Danny R. and Bonnie N. They were originally listed among all claims occurring at the Foundation during the policy years in issue. (Ex. F101-1 to F101-8.)

claims, only one (for Jodi D.) was reported in the first instance to State Fund. The six other claims were directed to be reported to the student accident carriers. Two of these six claims were erroneously diverted to the State Fund by Eisenhower Hospital some time after the claimants were first treated. State Fund apparently paid on these claims, without exploring whether they were properly presented to it, even though the records showed the initial direction to the student accident carriers. None of these diversions were initiated or acquiesced in by the Foundation, and the diversions were not noticed as such in the Foundation's records.

Referring to the two claims that were erroneously referred by third parties to State Fund, the first medical reports of injury for the Clients (Danny in April 2003, Ex. F100-3; Bonnie in May 2003, Ex. F103-3, 103-4, 103-5, 103-6, 103-7) showed on their faces that the claims were to go to insurers that were not workers' compensation carriers, namely SRS/Medical Management in Wheaton, Illinois for Danny, and American National Life Ins. Co. of Texas for Bonnie. (Ex. F100 and F103.)

The only other claim received by State Fund (the "Jodi claim") was submitted to it in error, and was due to sloppiness on the part of the Foundation employee submitting it, who apparently did not retain file copies of what he sent out. The Employer's Report of Occupational Injury or Illness (Ex. SC2-1) erroneously asserted that Jodi was a "Trainee" (Ex. SC2-1, square 12) in a "Sheltered Workshop." (Id., square 4.) The Doctor's First Report of Injury stated that the injured party was acting as a "Volunteer" (Ex. SC2-3) at the time of the incident, which was probably August 7, 2001. The last of the total medical expenses was incurred before August 30, 2001.[16] The Employer's Report of Occupational Injury or Illness (Ex. SC2-1) appears not to

[16] There was no disability or "lost time" claim involved, and all medical bills (totaling about $533) were incurred between August 10 and August 30, 2001. (Ex. SC2-4).

have been completed and submitted until some time after September 13, 2001,[17] after all medical expenses had been fully incurred. The Report (Ex. SC2-1) was an exhibit submitted by State Fund, and no copy of it was found in the Foundation's files. (Tr2. 31/24-25; 32/1.) It was, moreover, replete with errors and inconsistencies. (Tr2. pp.32-38) The same deficiencies, and others, also appeared in the Employee's Claim for Workers' Compensation Benefits for this Client (Ex. F102.8; Tr2. pp. 14-30). Nevertheless, the Jodi claim was paid by State Fund, and the Foundation has acknowledged that it should reimburse State Fund for the amounts paid. The Foundation has initiated steps to effect reimbursement to State Fund for amounts paid out by it on this claim, and these are still pending. (Ex.F103-11; F110.)

The claims processed through State Fund were submitted to it in error in all three cases. The direct submittal of the Jodi claim to State Fund by the Foundation was an isolated case. There was no pattern of submitting claims to State Fund for injuries to the Clients. The Foundation did not intend to have the Clients covered by workers' compensation insurance, nor did it submit claims knowingly or *sub rosa* to exploit the system without paying for coverage.

Legal Analysis

The Workers' Compensation System

The California workers' compensation system is established pursuant to article XIV, section 4 of the State Constitution, to provide medical and disability benefits (including compensation) for persons who are injured or harmed in the course of their employment, regardless of fault. In exchange for assured care and compensation, the employees give up the right to sue their employers for injuries they sustain on the job.[18] The employers bear the costs

[17] The State Fund "received" stamp on the report is August 16, 2001. The signature line is dated July 15, 2001, before anything happened; and the date of the employer's first knowledge of the incident is shown as September 13, 2001.

[18] Cal. Labor Code, section 3600.

of these benefits by providing for payment of compensation benefits --- typically by purchasing workers' compensation insurance.

One purpose of the workers' compensation laws is to allot the costs of employment injury to the employers who benefit from the employment, and not to impose those costs on society as a whole. To this end, the law requires that an employer provide for compensation benefits for all non-exempt employees.[19] Where provision is made through the purchase of workers' compensation insurance, as is the case for most employers, the insurance company is entitled to collect premium for each employee for whom it might have to pay compensation benefits in the event of injury. The premium for employees is normally based on the employer's payroll, and the rate is expressed as a stated number of dollars for each $100 of payroll. Because risks associated with types of employment vary, the State has also established a system under the USRP,[20] whereby businesses and occupations are sorted into distinct classifications, and the premiums charged for a classification will be based on the loss experience of businesses within that classification.[21] For example, the risks of severe injury in performing office clerical work are relatively low, entailing relatively low premium rates, as opposed to risks that may occur in heavy construction labor (significantly greater likelihood of long-term severe impairment), entailing much higher premium rates. The loss experience is reported and tabulated through the WCIRB under the USRP. The USRP contains an extensive listing of rating classifications that describe most occupations, employments, industries and businesses.

The workers' compensation system does not, however, require workers' compensation for persons who are not "employees," and there are statutory exceptions for persons who perform services in circumstances where public policy supports not having the "employer" pay for

[19] Cal. Labor Code, sections 3700, 3700.5
[20] See Footnote 3, page3, *supra*.
[21] Premiums actually charged by an insurer start with a classification's statistical loss experience as their basis. Add-ons to the basic loss experience for final premium purposes, however, vary from company to company.

workers' compensation. An example of the latter is a volunteer performing services gratuitously for a church or non-profit charitable organization (Labor Code §3352(i)), or doing so for "aid or sustenance" only (*Ibid* § 3352(b)).

Case Law on "Employee" Status

Based on the evidence adduced in this case, the Clients are much more akin to students than they are to employee/workers. Cases in California have recognized that "students" are generally not employees unless they are performing services of regular employees in order to earn income, or as part of a required program of vocational or professional training or apprenticeship looking toward career employment.

A lead case in this area is *Land v Workers' Comp. Appeals Bd.* (2002) 102 Cal.App.4th 491. In *Land*, the claimant was a student who had been injured in the course of pursuing an elective project in animal husbandry at California Polytechnic State University, San Luis Obispo ("Cal Poly"). The project, run by the Cal Poly Foundation ("CPF"), was to breed and raise cattle. The financial arrangements were that the students would share in 40% of the proceeds of cattle sales from the project,[22] the allocation among the students being based on the number of hours worked in the project by each. CPF provided student accident coverage for medical and dental bills resulting from accidental injury occurring during the class.

As described by the Court:

> Nicole Land was a full-time student at California Polytechnic State University, San Luis Obispo (Cal Poly). She enrolled in an elective course in animal husbandry. The class provided practical, hands-on experience in commercial cattle breeding. The course was administered by Cal Poly Foundation, a nonprofit corporation (Foundation). The animals, tools and equipment for the class were provided by the Foundation. Land paid tuition to attend the year-long class and earned two credits per quarter. Three teachers from Cal Poly's animal science department supervised the students. (102 Cal.App.4th 493)

* * *

[22] The other 60% was CPF's share.

> The WCJ concluded Land was not entitled to workers' compensation benefits primarily because she was not paid wages and *the purpose of the class was to provide students with hands-on experience, not monetary gain*. (*Ibid*, at 494). (Emphasis added.)

Distinguishing the case before it from cases where the student's work was part of a required training program, working with and doing the same work as full-time paid employees, the Court alluded to *Coburn v Workers' Comp. Appeals Bd.* (1989) 54 Cal. Comp. Cases 129, a case that involved a bee-raising project, and noted:

> * * * In *Coburn*, a student at Cal Poly was injured while in a class raising bees for honey production. Like Land, Coburn signed an "enterprise contract" providing that Cal Poly would advance expenses and any profit would be split among the students after Cal Poly had been reimbursed. The WCAB ruled that Coburn was not an employee under the Act because Coburn's activities as an apiary inspector were conducted for educational purposes only and that Cal Poly received no tangible benefit or consideration flowing from Coburn's activities. (102 Cal.App.4th 495).
>
> We recognize that a student may at times be an employee of a school; for instance, when a student works in the school's cafeteria or library for wages in addition to attending classes. Or, as in *Barragan* and *Anaheim*, a student may be an employee of a third party engaged by the school to provide the student with practical training in addition to the academic instruction offered by the school where the student renders services that are of economic benefit to the third party. *The students of a school, however, are not employees, but consumers of its product, education. In our view, the crucial question is whether it may reasonably be said that a student is "rendering service" for his or her university in participating in its educational programs. (See § 3357.) We conclude that, in fact, the university is "rendering service" to the student by providing its full panoply of educational resources for the student's use.* (*Ibid*, at 496.Emphasis added.)

State Fund cited the 1961 case of *State of California, Subsequent Injuries Fund v. Industrial Accident Commission, Marino Corsinotti, etc.* (1961) 196 Cal. App. 2d 10 (case is hereinafter referred to as "*Corsinotti*"), as the principal authority for its determination that the Clients were employees for workers' compensation purposes. For the reasons discussed below, *Corsinotti* is <u>not</u> persuasive authority for the present case.

Corsinotti was an appeal from an order of the Industrial Accident Commission awarding compensation for personal injury to Corsinotti, a 22-year–old mentally retarded man who attended a sheltered workshop program conducted by Aid Retarded Children, Inc. ("ARC"). The program was staffed at the time of the accident by a director, a secretary, and a group of volunteers composed of the parents of retarded children. The program consisted of sorting old newspapers for sale to florists, van and storage companies and others. The paper was sold for a profit to ARC of $32.50 per ton after it was sorted and bundled.

Corsinotti engaged in the sorting and bundling activity and was paid on a piece-rate basis for his work. His duties included tying the bundles with string. While using a knife to cut the string, he struck his right eye, and suffered the injury for which compensation was awarded.

The main issue in the Industrial Accident Commission proceedings was whether Corsinotti was an employee of Aid Retarded Children ("ARC") when he was injured. The Executive Director of ARC specifically testified that an employment relationship *existed and was intended*.

The Court described its limited task as follows:

> * * * We must decide only whether substantial evidence corroborates the commissioner's declaration "that the evidence . . . supports a finding that an employment relationship was created within the meaning of the Labor Code." Since the presence of the employment relation constitutes a question of fact [Citation.], we should not disturb the commission's finding if it is supported by substantial evidence. [Citation.] * * * [The] first duty * * * of the court is to search the record to discover whether the evidence is reasonably susceptible to the inferences drawn by the commission in support of its conclusion, and, upon favorable discovery, to affirm the award. (196 Cal.App.2d 10, at page 13.)

Petitioner Subsequent Injuries Fund argued that there was no employment relationship and that:

> The agency [ARC] * * * as a matter of therapy, set up a simulated employment relation to prepare the trainees for ultimate entrance into the labor market. ARC did not, they argue, actually intend to make Corsinotti an employee. (196 Cal. App. 2d 10, at 13-14.)

The Court rejected the argument, stating (*ibid,* at page 14):

> * * * The agency would not deny that it sought to train the participants to function in the employment relationship so that they eventually could accommodate themselves to commercial employment. But that motive found accomplishment in an expressed intentional employer-employee relation. Margaret Connolly, the Executive Director of ARC, testified that the relation existed and that it was no mere form of occupational therapy.
>
> The relationship exhibited the classic symbols of employment: Corsinotti received compensation on a piece-rate basis for work performed, earning about $2.50 per week; he conformed to regular hours from 9 a.m. to 5 p.m.; he had a one-hour lunch period; he worked five days per week * * *
>
> These indicia of employment buttressed by the express intent to employ Corsinotti support the commissioner's determination. * * * These criteria certainly support an inference of its [employment relationship] existence; we cannot, then, upset the attacked but confirmed finding of the commission. If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award.

The distinctions between *Corsinotti* and the present case are evident and material:

1. In *Corsinotti*, the Court was limited to determining whether there was substantial evidence from which an inference of employment could reasonably be drawn. The Court was not determining whether there was in fact an employment relationship, nor whether one was established or rebutted by the weight of the evidence.

In the present case, direct determination of the issue is required based on weighing the evidence presented.

2. In *Corsinotti*, the Executive Director of the putative employer, ARC, testified that an employment relationship <u>existed</u> and was <u>intended</u>. Opposition to this position came only from the entity that was held liable to pay compensation benefits.

In the present case, the Foundation contends that no employment relationship with these Clients existed or was intended.

3. Corsinotti received compensation on a piece-rate basis for work performed, and he conformed to regular employment hours of 9 a.m. to 5 p.m. five days per week.

In the present case, the stipend received by the Clients was in no way related to work they performed or products they produced, nor to whether they did or did not participate in work activity programs. Their attendance day was 6.5 hours per day, not a "normal" 9-to-5 work day.

4. Corsinotti was in a sheltered workshop program, in which "The agency would not deny that it sought to train the participants to function in the employment relationship so that they eventually could accommodate themselves to commercial employment." (*Corsinotti*, at 196 Cal.App.2d 14.)

In the present case, the Clients were not in a sheltered workshop program and were not being trained with the goal of eventual commercial employment.

Based on the above distinctions, the *Corsinotti* case is not persuasive authority for decision in the present case.

Statutory and Regulatory Law on "Employee" Status

Labor Code section 3351 defines an "employee" for workers' compensation purposes as every person "***in the service of*** an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (Emphasis added.) Section 3357 of the Labor Code augments this definition, stating: "Any persons ***rendering services for another***, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (Emphasis added.)

The statutory definitions contemplate that the employee performs services that benefit or serve the employer. This comports with a basic rationale for the workers' compensation system --- to allot the costs of employment injury to the employers who benefit from the employment, and not to impose the costs on society as a whole.

The Foundation's Clients in this case perform simulated labor as part of their life training experience, and **not** in order to "render services for" the benefit of the Foundation for which it would otherwise hire employees. Instead, the Clients are consumers of the training and learning experience the Foundation provides. The Clients do not "earn" that training or learning experience nor do they "earn" their modest stipends in any sense by a *quid pro quo* of useful labor. Even as the court concluded in the *Land* case, *supra*, with respect to the university, the Foundation in this case "is 'rendering service' to the student by providing its full panoply of educational resources for the student's use." (*Land, supra*, at 102 Cal. App. 4th 496.)

Within the workers' compensation insurance classification system, the Sheltered Workshop Classification (8806) is defined as including sheltered workshops and work activity centers. Sheltered workshops provide employment training to persons who have the capacity potentially to become part of the work force. Work activity centers, on the other hand, such as those conducted in the Clients' programs at the Foundation, are not focused on employment training for eventual membership in the work force.

Recognizing the distinctions, the California Labor Code specifically provides (Labor Code, section 3351.5) that "employee" includes:

> Any person whose *employment training* is arranged by the State Department of Employment with any employer. Such person shall be deemed an employee of such employer for workers' compensation purposes; provided that the Department shall bear the full amount of any additional workers' compensation insurance premium expense incurred by the employer due to the provisions of this section. (Emphasis added.)

No comparable provisions are found with respect to participants in work activity centers whose "training" is not "employment training" arranged by the State Department of Employment. When consulted by the Foundation on this issue, the Employment Department expressly repudiated any responsibility for potential workers' compensation insurance premium

that might become owed for participants (such as the Clients in this case) in "work activity programs." (Ex. 13)

Turning further to the description of Classification 8806, it applies by its terms to, and lists: "all employees – including supervisors, educational instructors, counselors, production managers and vocational evaluators." (USRP, 2002, page 96; USRP, 2001, page 96.) Nowhere does the employee itemization refer to the participants being "supervised," "educated," "counseled," "managed," or "evaluated" by the listed employees. Applying the interpretive doctrine of *ejusdem generis* (literally, "things of the same class"), the specifically described "employees" in 8806 are all of a "class" that oversees the trainees in the workshop program. The listed employees are on a different level and are not of the "same class" as the trainees, who could easily have been included in the itemization but were not.

The authority for treating trainees in such facilities as "employees" is not in the classification description, but derives from the special provisions of Labor Code section 3351.5, which applies only to "persons whose *employment training* is arranged by the State Department of Employment." (Emphasis added.)

The Clients are not in programs of "employment training." They do not come for vocational training looking to eventual commercial employment. They are not "in the service" of the Foundation (Labor Code, section 3351) nor do they "render services" for it (*ibid*, section 3357). The Clients come to the Foundation voluntarily and avail themselves of the Foundation's training and facilities to practice and improve their living and socialization skills. They are not apprentices under any "contract of hire or apprenticeship, express or implied." (Labor Code, section 3351.) They engage in activities and learning experiences that simulate vocations, but

are conducted at tempos and levels that may be characterized as "parallel" to, but different from, the everyday world of persons with normal capabilities.

These Clients are learners. Their stipend is not related to any work they perform but is rather a thread in the overall fabric of their Individual Program Plans. They receive their stipend whether or not they elect to participate in any programs. They are not employees and are not required to be covered for workers' compensation benefits.

Estoppel Argument

State Fund presented a half-hearted argument, without citing legal authority, that the Foundation should be estopped from asserting that the Clients are not employees, because three claims were submitted to State Fund on behalf of three different Clients. As found by the ALJ, all three claims were submitted in error, two of them by the treating hospital in direct contravention of the directions contained in the initial reports of injuries, and one due to the carelessness of a Foundation employee.

The one claim that did come from Foundation (the "Jodi claim") was replete with errors, and erroneously represented that the injured person was a "trainee in a sheltered workshop" (Ex. SC2-1). This description of the injured person was the fundamental erroneous representation made in presenting the claim to State Fund, and, as noted, the document containing the representation (Ex.SC2-1) was not in the Foundation's files.

The current version of the estoppel doctrine is stated at Evidence Code section 623, as follows:

> 623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Section 623 was enacted in 1965, became effective on January 1, 1967, and replaced former Code of Civil Procedure section 1962(3). The post-1967 cases carry forward the

concept expressly stated in former code section1962(3) that the party making the representation will be estopped from contradicting a *negligent* as well as an intentional representation if the intent is to induce another to act in reliance on it. Fraudulent intent is not an essential element of the estoppel doctrine. (See 11 Witkin, Summary of Cal. Law [9th ed. 1990] Equity, § 179, p. 861.)

In the Jodi claim the negligent misrepresentation was that the claimant was a trainee in a sheltered workshop. This statement was sufficient to induce State Fund to cover the claim.[23] If the estoppel doctrine is applied, it would be to bar Foundation from denying that Jodi was in a sheltered workshop, as opposed to a nonvocational habilitation program. Such an estoppel cannot, however be enlarged to support State Fund's argument that the Foundation is estopped from asserting that the Clients in issue were not employees of the Foundation.

CONCLUSIONS AND DETERMINATION OF ISSUES

1. The determination by State Fund that the habilitation Clients of Foundation were "employees" is incorrect. The Foundation is not required to provide or pay for workers' compensation insurance covering these Clients. The Foundation is not estopped from claiming that the Clients were not employees.

2. As stipulated by the parties, the five program directors and instructors who supervised and taught the habilitation Clients are assigned to Classification Code 8868 ("Colleges or Schools – Private – not automobile schools – professors, teachers or professional employees") for purposes of determining workers' compensation premium payable to cover them.

[23] See discussion of Labor Code section 3351.5, *supra*, at page 23.

3. As a consequence of conclusions 1 and 2, and as stipulated by the parties, the governing classification for the Foundation is Classification 8868, which is the classification to which the largest portion of the Foundation's payroll is assigned for each of the policy years in issue.[24] Accordingly, Foundation's bus drivers are assigned to Classification Code 9101.

ORDER

The decision of the State Compensation Insurance Fund that the habilitation Clients of Appellant are "employees" for workers' compensation purposes is overruled. State Fund shall recalculate and adjust the premium billings to Foundation for the policy years 2001 and 2002 accordingly.

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I submit this Proposed Decision on the basis of the evidence presented to me, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: April 11, 2005

/s/
DAVID R. HARRISON
Administrative Law Judge
Department of Insurance

[24] See footnote 5 at page 3, *supra*.